

TENNESSEE GENERAL ASSEMBLY  
FISCAL REVIEW COMMITTEE



**FISCAL MEMORANDUM**

**HB 1479 – SB 1558**

April 19, 2016

**SUMMARY OF ORIGINAL BILL:** Permits a witness exempt from sequestration to testify in any order—not just first—if the court determines within its discretion that no prejudice would result.

FISCAL IMPACT OF ORIGINAL BILL:

NOT SIGNIFICANT

**SUMMARY OF AMENDMENT (016258):** Deletes all language after the enacting clause and rewrites the bill.

Updates Tenn. Code Ann. § 40-35-121 (criminal gang offenses—enhanced punishment—procedure) to require the underlying offense to be committed at the direction of, in association with, or for the benefit of the defendant’s criminal gang or a member of the defendant’s criminal gang.

Authorizes a law enforcement officer to arrest a person without a warrant when the person has committed a criminal offense though not in the officer’s presence.

Authorizes a law enforcement officer to arrest a person without a warrant when a misdemeanor has in fact been committed and the officer has reasonable cause for believing the person arrested has committed the misdemeanor.

Authorizes a law enforcement officer to arrest a person for misdemeanor theft in a retail or wholesale establishment if the officer has probable cause to believe the person committed the offense.

**FISCAL IMPACT OF BILL WITH PROPOSED AMENDMENT:**

**Increase State Expenditures – \$218,200/Incarceration\***

**HB 1479 – SB 1558**

Assumptions for the bill as amended:

*Criminal Gang Offense*

- Tennessee Code Annotated § 40-35-121 provides an enhanced punishment for any “criminal gang member” to commit a “criminal gang offense.” A district attorney general must charge a criminal gang offense separately. If convicted, the criminal gang member will be punished one classification higher than the classification established by the specific statute creating the underlying offense committed.
- Under Tenn. Code Ann. § 40-35-121(b), a person commits a criminal gang offense, and, thus, is punished one classification higher, if at the time of the offense the person was a criminal gang member. There is no requirement that the underlying offense be gang-related.
- The Tennessee Court of Criminal Appeals held in *State v. Bonds*, No. E2014-00495-CCA-R3-CD, 2016 Tenn. Crim. App. LEXIS 266, (Tenn. Crim. App. April 7, 2016), that subsections (b) and (e) of Tenn. Code Ann. § 40-35-121 violated substantive due process, because the subsections contain no nexus between the underlying offense and the criminal activity of a gang. *Id.* at \*81-82.
- The Court noted:

There is no Tennessee law prohibiting membership or affiliation with a criminal gang as defined in Section 40-35-121. Thus, a defendant’s affiliation with such a group is statutorily permissible and innocuous until it is joined with otherwise criminal conduct. However, Section 40-35-121(b) imposes mandatory punishment on an eligible defendant by imputing to him responsibility for the criminal activity of the gang as a collective without requiring the defendant’s knowledge of and intent to promote such activity.

- The bill as amended rewrites subsections (b) and (e) of Tenn. Code Ann. § 40-35-121 to require a nexus between the underlying offense and the criminal activity of a gang.
- The bill as amended narrows the criminal gang offense, but it is assumed that the change will not significantly reduce admissions. It is assumed that the bill as amended will not significantly impact state incarceration costs or the operations of the courts, district attorneys, or public defenders.

*Warrantless Arrest for Misdemeanors*

- Under current law, a law enforcement officer cannot arrest a person for a misdemeanor offense without a warrant unless the offense was committed in the officer’s presence. Tenn. Code Ann. § 40-7-103; *Pesterfield v. Vickers*, 43 Tenn. 205, 209-10 (1866); *Hurd v. State*, 108 S.W. 1064, 1067 (Tenn. 1907); *Cf. State v. Ash*, 12 S.W.3d 800, 804-05 (Tenn. Crim. App. 1999). A law enforcement officer may arrest without a warrant any person the officer has probable cause to believe has committed felony theft of property in retail or wholesale establishments. Tenn. Code Ann. § 40-7-117.
- The bill as amended authorizes law enforcement officers to arrest a person without a warrant for a misdemeanor committed outside of the officer’s presence or for a

misdemeanor that the officer has reasonable cause to believe was committed by the person arrested. Further, the bill as amended authorizes a law enforcement officer to arrest a person for theft offenses, felony or misdemeanor, without a warrant if the officer has probable cause to believe the person committed the offense.

- The bill as amended will increase the number of misdemeanor arrests and convictions because it broadens the ability of law enforcement officers to arrest persons suspected of having committed misdemeanor offenses. The Tennessee Law Enforcement Training Academy (TLETA) and the Peace Officers Standards and Training (POST) confirm that the bill as amended widely broadens an officer's ability to charge someone for misdemeanors committed outside their presence.
- Because some misdemeanor offenses, particularly simple possession and casual exchange of a controlled substances, can be enhanced to a felony when a defendant has prior convictions, the bill as amended will increase the number of admissions into the custody of the Department of Correction (DOC).
- The bill as amended will also increase admissions for felony theft because an officer, who has probable cause to believe that a person committed a misdemeanor theft, may execute a warrantless arrest against a person that may be enhanced to felony theft if the value of the property is greater than the law enforcement officer suspected.
- There is insufficient data relative to the number of misdemeanor offenses that go unpunished because law enforcement officers cannot make a warrantless arrest. There is also insufficient data relative to the number of these offenses that go unpunished that would be enhanced to a felony.
- However, it is reasonable to assume that because the bill as amended greatly broadens law enforcement officers' ability to make warrantless arrests and charge someone for misdemeanors that the bill as amended will result in at least five admissions per year for misdemeanor offenses being enhanced to felonies.
- Most misdemeanor offenses are enhanced to Class E felonies.
- According to the U.S. Census Bureau, population growth in Tennessee has been 1.12 percent per year for the past 10 years, yielding a projected compound population growth of 11.78 percent over the next 10 years. Population growth will account for one (5 x .1178) additional admission for a total of six (5 + 1).
- Statistics from the DOC show that the average time served for a Class E felony is 1.47 years (536.92 days).
- According to the DOC, the average operating cost per offender per day for calendar year 2016 is \$67.73.
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on an offender serving a 1.47 years (536.92 days) for a total of \$36,365.59 (\$67.73 x 536.92 days). The total increase in state incarceration costs for six offenders is estimated to be \$218,193.55 (\$36,365.59 x 6).
- The bill as amended will increase the misdemeanor caseloads of the courts, district attorneys, and public defenders. It is assumed that the increase will not be significant enough to require any additional attorneys or staff.

*\*Tennessee Code Annotated § 9-4-210 requires an appropriation from recurring revenues for the estimated operation cost of any law enacted after July 1, 1986 that results in a net increase in periods of imprisonment in state facilities. The amount appropriated shall be based upon the highest cost of the next 10 years.*

**CERTIFICATION:**

The information contained herein is true and correct to the best of my knowledge.

A handwritten signature in dark ink that reads "Krista M. Lee". The signature is written in a cursive, flowing style.

Krista M. Lee, Executive Director

/trm